IN RE FOURSEA CONSTRUCTION (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KL REKHRAJ J
[ORIGINATING SUMMONS NO: D6-24-259-1998]
23 JUNE 1998

COMPANY LAW: *Arrangement - Meeting of creditors - Companies Act 1965, s. 176(1) - Whether application must be dealt with summarily by hearing inter partes - Whether application may be proceeded ex parte*

COMPANY LAW: *Arrangement - Meeting of creditors - Companies Act 1965, s. 176(1) - Winding-up proceedings initiated prior to application under s. 176(1) - Whether application must be made in the very winding-up proceedings - Whether application should be granted - Whether stay should be granted under s. 222 - Whether company 'hopelessly insolvent'*

The applicant had earlier obtained a restraining order pursuant to s. 176(10) of the Companies Act 1965 ('the CA') (*vide ex parte* Originating Summons No: D2-24-104-98) for a period of three months which was due to expire on 23 June 1998. Subsequently, the applicant filed a fresh *ex parte* originating summons (the instant application) for an order *inter alia* convening a meeting of creditors pursuant to s. 176(1) of the CA for the purpose of soliciting the consent of its creditors to a scheme whereby the unsecured creditors would be paid 20% of the debts, and that the creditors be restrained from taking proceedings or further proceedings against the applicant.

At the material time, there were already three winding-up petitions against the company pending in the High Court, Kuala Lumpur, viz, D6-28-83-98 fixed for hearing on 24 June 1998, D4-28-474-97 fixed for hearing on 26 June 1998 and D3-28-21-98 fixed for hearing on 23 September 1998.

Held:

[1] An application under s. 176(1) of the CA must be dealt with **summarily**, ie by hearing ***inter partes***, with an opportunity given to the known creditors to make their representation. Such an application must **not** be proceeded *ex parte* as it will be a great injustice to the creditors who are legally entitled to enforce execution proceedings.

[2] Section 176(1) of the CA gives the court a discretion only if there are **no** winding-up proceedings initiated prior to the application; if there already are winding-up proceedings, then the application must be made in the **very** winding-up proceedings by making the petitioners and the supporting creditors, if any, as parties thereto.

[2a] A stay may be granted under s. 222 of the CA if the court (in the winding-up proceedings) is satisfied that an arrangement can be reached after considering the wishes of all the creditors. On the other hand, if the court is satisfied that the company's financial position is one which is "hopelessly insolvent", then the application should be refused. It will be against the interest of the commercial world and morality to permit further trading losses which may never be discharged.

Legislation referred to:
Companies Act 1965, ss. 176(1), (10), 177(1)(a), 222

For the applicant - Conrad Young; M/s Azman Davidson & Co
For the intervener - Prakash Mehta; M/s Prakash Baljit & Co

Reported by Alex Chang

JUDGMENT

KL Rekhraj J:

The applicant filed this *Ex parte* Originating Summons under s. 176(1) and (10) of the Companies Act 1965 for an Order that:

(i) the applicant be directed to convene separate meetings to be held in respect of its two classes of creditors described as the Secured Creditors and Unsecured Creditors for the purpose of considering and if thought fit approving with or without modification the scheme of arrangement proposed to be made between the applicant and its creditors;

(ii) the said meetings are to be held on or before 04-09-1998 between the hours of 9.00 am and 5.00 pm;

(iii) the Applicant be at liberty to fix an earlier date and the venue of the meetings;

(iv) Mr. Lim Ming Woei, a Director of the Applicant, or failing him Mr. Yaw Kong Meng, a Director of the Applicant be appointed as Chairman of the said meetings and the said Chairman be directed to report the results thereof to this Honourable Court;

(v) the said meetings be summoned by the giving of not less than 21 days notice and that such notice be given by way of:

(a) sending by ordinary mail the Notice in the form annexed herewith as Annexure 1 with the blanks appropriately filled therein to the last known address of each of the Creditors and/or their Solicitors address for service; and

(b) advertising the Notice in the form annexed herewith as Annexure 2 once in English in the "Star" newspaper and once in Bahasa Malaysia in the "Berita Harian" newspaper;

(vi) notice of the said meetings be deemed to have been duly effected only upon two clear days of the posting of the said Notices to the Creditors last known address and/or their Solicitors address for service and after the publication of the advertisments;

(vii) the Applicant by itself or through its agents do send a copy of the said Scheme and the corresponding statement required to be furnished pursuant to section 177(1)(a) of the Companies Act 1965 together with the form of proxy and form of proof of debt (hereinafter referred to as the Applicant's documents) to all the Applicant's Creditors together with the Notice annexed as Annexure 1 and also to any Creditor who files a proof of debt in compliance with the requirements of the advertisements;

(viii) in addition to the above, the Applicant and its agents are to make available to all the Applicant's Creditors copies of the Applicant's documents which can be obtained from the Applicant's office at No. 19B, Lorong Rahim Kajai 13, Taman Tun Dr. Ismail, 60000 Kuala Lumpur, on any working day except Saturday between the hours of 9.00 a.m. and 5.00 p.m.;

(ix) pursuant to section 176(10) of the Companies Act 1965 the:

(a) Petitioners, Plaintiffs their servants or agents to the actions or proceedings against the Applicant more specifically set out in Exhibit "YKM–6" (being the list of Creditors) to the affidavit of Yaw Kong Meng affirmed on 15-06-1998; and/or

(b) any of the Applicant's creditors their servants or agents;

be restrained except by leave of this Court and subject to such terms as this Court may impose, from all further action or further proceedings as well as any intended or future proceedings including winding-up, execution or arbitration proceedings (the Order herein is hereinafter referred to as the said Restraining Order) pending the approval of the Scheme by the Court or until further order;

(x) service of the said Restraining Order be effected:

(a) on all persons affected by the Restraining Order; and

(b) if such person is a company, on the company as well as on its directors;

by way of advertising a copy of this Order without the annexures thereto, once in English in the "Star" newspaper and once in Bahasa Malaysia in the "Berta Harian" newspaper and also by way of sending by ordinary mail to the last known address of such affected person and/or company a photocopy of the Restraining Order without the annexures thereto;

(xi) service of the said Restraining Order be deemed effected only upon two clear days of the posting of the said Restraining Order and after publication of the said Restraining Order in the said newspapers; and

(xii) such further directions or orders be given as deemed fit by this Honourable Court.

This *ex parte* application was supported by an affidavit of Yaw Kong Meng, the director of the applicant company deposing that:

(i) the authorised; issued and paid-up capital of the company is RM1,000,000; and

(ii) the company has incurred a large amount of debts; showing in the Balance Sheet for December 1997:

the Fixed Assets	–		RM951,665
Current Assets (Trade Debtor	–	1,317,158	
other Debtor/ Deposit	–	1,922,322	RM3,239,480
Current Liabilities			RM11,304,568
Net Current Liabilities			RM7,112,345

(iii) that there are potential investors who at this stage wish to remain unidentified and unnamed but who are willing to inject fresh capital should the Scheme be approved by the Creditors and sanctioned by the Court;

(iv) that the unsecured Creditors subject to the Scheme being approved shall be paid twenty per cent as follows:

(a) twelve months from effective date ten per cent;

(b) twenty four months from effective date ten per cent.

The first ten per cent payment to be made from the **expected** collection of their claims and they must undertake to give up their claim on the remaining eighty per cent.

It was also learnt in the course of the hearing; that there are on record three winding-up petitions; pending hearing in the High Courts Kuala Lumpur as:

(i) D6-28-83-98 fixed for 24th June 1998;

(ii) D4-28-474-97 fixed for 26th June 1998;

(iii) D3-28-21-98 fixed for 23rd September 1998.

The applicant had earlier on 18 March 1998, prior to the presentation of this second *ex parte* application, proceeded to file an *ex parte* Originating Summons No. D2-24-104-98 for an Order that all proceedings pending against the company, including the winding-up petitions heretofore referred be restrained pending the implementation of the proposed scheme; and in view of the obvious urgency of the matter, the said application be and was disposed of *ex parte.*

The High Court Judge in D2-24-104-98 granted the Order but limited it for a period of three months; expiring on 23 June 1998.

I obviously would have expected the applicant's solicitors to go to the very D2 court for any enlargement of time; or for any other prayers; instead of filing a fresh *ex parte* Originating Summons in the circumstances.

Upon hearing, I refused the application and dismissed it because s. 176(1) of the Companies Act 1965, reads:

> (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may on the application in a **summary way** of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator; order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

Such an application under the section must be dealt summarily, ie, by hearing *interpartes*; with an opportunity given to the known creditors on record; to make their representation, and not by *ex parte*; as by so proceeding, great injustice is caused to the creditors who are legally entitled to enforce execution proceeding *(ex debito justitia)*; and are thus put to further unnecessary expense in setting aside the Orders.

I am also of the view that s. 176(1) application – gives the court the discretion only if there are no winding-up proceedings initiated prior to the application; and if there are such winding-up proceedings, then any such application must be made in the very winding-up proceedings by making the petitioners and the supporting creditors, if any, as parties thereto; and the presiding Judge in the winding-up court would then have before him the wishes of all the creditors or contributories in coming to some conclusion by either making the Order for Arrangement and/or reconstruction and thus granting a stay under s. 222 of the Companies Act; or refuse the application, if satisfied that the company's financial position is one of being a "hopelessly insolvent" – ie, it is unable to meet the creditors current demands; and that it would be against the interest of the commercial world and morality to permit further trading losses which may never be discharged and to wind-up the company.

I accordingly dismissed the application.